UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CASSANDRA L. COLSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-108-B***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

The plaintiff in this case, who seeks disabled adult child's insurance benefits and supplemental security income ("SSI") benefits, raises several issues: whether the administrative law judge failed to develop the record adequately, whether the administrative law judge failed properly to assess the plaintiff's claim of pain, whether there is substantial evidence to support the administrative law judge's conclusion concerning the plaintiff's credibility and whether there is substantial evidence in the record to support the conclusion that the plaintiff did not suffer from a severe impairment. I recommend that the decision of the commissioner be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the

[1] This action is properly brought under 42 U.S.C. § 405(g) & 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on March 11, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since the alleged onset of disability, Finding 2, Record at 16; that the plaintiff's subjective allegations were not credible, Finding 3, *id*.; that the plaintiff did not have an impairment or combination of impairments that were severe, Finding 4, *id*.; and accordingly that the plaintiff was not under a disability as that term is defined in the Social Security Act at any time through the date of the decision, Finding 5, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id*. at 1124 (quoting Social Security Ruling 85-28).

Discussion

I do not reach the plaintiff's arguments concerning the administrative law judge's evaluation of her claims of pain, her credibility or the residual functional capacity ("RFC") assigned by a reviewing physician at the state-agency level because the decision was made at Step 2 of the sequential evaluation process, where neither credibility, subjective allegations of pain nor RFC is relevant. At Step 2, the commissioner decides whether any impairment or combination of impairments is severe. 20 C.F.R. §§ 404.1520(c), 416.920(c). An impairment or combination of impairments is not severe if it does not significantly limit the claimant's physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). An impairment "must be established by medical evidence." 20 C.F.R. §§ 404.1508, 416.908. The section of the regulations cited by the administrative law judge in this case, Record at 16, provides:

> (a) *Sources who can provide evidence to establish an impairment*. We need evidence from acceptable medical sources to establish whether you have a medically determinable impairment(s). See § 404.1508. Acceptable medical sources are —
>
> (1) Licensed physicians . . .;
> (2) Licensed or certified psychologists. . . .;
> (3) Licensed optometrists . . .;
> (4) Licensed podiatrists . . .;
> (5) Qualified speech-language pathologists . . . .

20 C.F.R. §§ 404.1513(a), 416.913(a). Accordingly, the reports of the chiropractor and nurse practitioner on which the plaintiff relies, Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 6) at 5-9, may not be used to establish the existence of an impairment, which is a necessary prerequisite to the Step 2 determination that an impairment is or is not severe. As the plaintiff notes, and the case law on which the plaintiff relies establishes, such reports may be used to assess the severity of any such impairment and its impact on a claimant's ability to work, 20 C.F.R. §§ 404.1513(d), 416.913(d), but that is a different issue.

The plaintiff contends that her morbid obesity alone constitutes a medically determinable impairment under Social Security Ruling 02-01p, which was issued after the administrative law judge's decision was issued. Itemized Statement at 7-8. Counsel for both parties agreed at oral argument that I should look to this Ruling for guidance, even though it took effect after the action of the Appeals Council in this case, Social Security Ruling 02-01p (September 12, 2002), 2000 WL 628049, and thus is not applicable authority for this claim. The Ruling provides, in relevant part:

> When establishing the existence of obesity, we will generally rely on the judgment of a physician who has examined the claimant and reported his or her appearance and build, as well as weight and height. Thus, in the absence of evidence to the contrary in the case record, we will accept a diagnosis of obesity given by a treating source or a consultative examiner.

Id. at *3.

The plaintiff relies on the evaluation of a non-examining physician reviewer, Dr. Weaver, in this regard, and cites this evaluation as evidence of a severe impairment because the exclusion of heavy and medium work by virtue of the physical limitations listed by Dr. Weaver "[b]y definition" means that there must be an impairment with more than a minimal effect. Itemized Statement at 4, 7-8. This argument is inapposite for a Step 2 analysis. Under the regulations, state agency medical consultants' assessments are considered statements by non-examining physicians and must be based on an acceptable medical source's findings. 20 C.F.R. §§ 404.1513(c), 416.913(c). They cannot be substituted for evidence from acceptable medical sources.

The plaintiff contends, Itemized Statement at 6, that the nurse practitioner's records should be considered for purposes of Step 2 notwithstanding the regulatory language because her report is "properly considered a part of the opinion of the supervising physician," citing *Gomez v. Chater*, 74 F.3d 967 (9th Cir. 1996). In that case, the court noted that the nurse practitioner consulted with a physician numerous times and worked "closely under the supervision of" that physician, acting as his

agent. 74 F.3d at 971. The court also concluded that a plain reading of the relevant regulations "indicates that a nurse practitioner working in conjunction with a physician constitutes an acceptable medical source, while a nurse practitioner working on his or her own does not." *Id.* Here, there is no indication in the nurse practitioner's records that she was working other than on her own in her treatment of the plaintiff. Record at 214-24. There is no evidence that the nurse practitioner was working closely under the supervision of a physician, and, under Maine law, such supervision is not always required. 32 M.R.S.A. §§ 2102(2-A) (certified nurse practitioner must practice under supervision of licensed physician for 24 months), 2205-B(3) (certified nurse practitioner may perform medical diagnosis or prescribe therapeutic measures when those services delegated by physician).

The fact that nurse practitioners in Maine need not work under the supervision of a physician after the first 24 months is also relevant to the plaintiff's contention that the administrative law judge was required to develop the record further, although she does not suggest what further development was necessary. Itemized Statement at 11-16. To the extent that this argument deals not merely with the plaintiff's discussion of the administrative law judge's assessment of the credibility of her testimony and may be construed to suggest that the administrative law judge was required to contact a physician at Sunbury Family Medicine, where the nurse practitioner worked, Record at 214, that argument also fails. Since there is no need for the nurse practitioner to be supervised by a physician under Maine law, any such inquiry would not be required as part of the administrative law judge's duty to develop an adequate record, particularly where, as here, the claimant was represented by counsel at the time of the hearing. Under these circumstances, the administrative law judge would not be seeking "easily obtained further or more complete reports," *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991), but would be asking a physician to examine a patient and generate a new report, all for the purpose of a Step 2 inquiry, where the claimant bears the burden of proof. This duty cannot be construed so

widely as to require the administrative law judge to provide an acceptable medical source to every claimant who presents without one.

At oral argument, counsel for the plaintiff specified several pages of the administrative record where medical providers had recorded the plaintiff's height and weight, contending that this was sufficient evidence of the existence of obesity as an impairment. Such an argument would require the administrative law judge to assess the medical significance of this data, which the administrative law judge may not do. *See Manso-Pizarro*, 76 F.3d at 17. However, counsel for the plaintiff did point to one page in the record where a physician in February 2000 made a diagnosis of obesity. Record at 144. That appears to be sufficient to meet the threshold requirement set forth in Ruling 02-01p. The question then becomes whether the records of medical providers, including the chiropractor and the nurse practitioner, are sufficient to establish severity at Step 2.

Counsel for the commissioner took the position at oral argument that evidence from acceptable medical sources is also necessary to establish the severity of an impairment, but that position is inconsistent with the regulatory language, which clearly requires such evidence to establish the existence of an impairment, but allows severity to be established by evidence from such sources or from other sources. 20 C.F.R. §§ 404.1513(a) & (d), 416.913(a) & (d).

Neither the chiropractor nor the physician on whose records the plaintiff relies makes any connection in those records between the plaintiff's obesity and any significant limitation on the plaintiff's ability to do basic work activities. Record at 121-31 (chiropractor), 133-53 (EMMC Family Practice Center). To the extent that any limitation is mentioned in those records, it is tied to injury suffered in a motor vehicle accident. The same is true of the records of the nurse practitioner; the ongoing physical limitations mentioned are due to back pain, which is connected to the accident. Record at 215, 216, 223. The medical records do not provide evidence that would allow a

conclusion that the plaintiff's obesity imposes more than minimal limitations on her ability to perform basic work activities. Accordingly, there is no reason to overturn the commissioner's conclusion at Step 2.

Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 13th day of March, 2003.

_____
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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